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Supreme Court, U.S.
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No. 87-

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court of appeals has nullified *Johnson v. Transportation Agency* and crippled voluntary affirmative action by ruling that the District of Columbia's race-conscious hiring of firefighters violated Title VII of the Civil Rights Act of 1964, where

1) the predicate for hiring was that, since 1969 to the eve of this litigation, the District had used tests which severely disadvantaged blacks and were probably not valid, and

2) that hiring was implemented so as not to create a preference for blacks and did not disadvantage whites in the slightest.

PARTIES

In the court of appeals, three cases were consolidated. *See* App. at 131a. The parties aligned with Marion S. Barry, Jr., were Theodore R. Coleman, Chief D.C. Fire Department; Preston Edwards, Equal Employment Opportunity Officer, D.C. Fire Department; Maudine R. Cooper, Director, D.C. Office of Human Rights; Clinton A. Hilliard, Director, D.C. Office of Personnel; and the District of Columbia, a municipal corporation. The parties aligned with the United States were Kevin Michael Byrne; Curtis J. Callaway; Ronald J. Danner; James A. Funk; Thomas I. Herlihy; Joseph Worth Lane, Jr; Stuart J. Winokur; John E. Yocum; David E. Zollars; and Local 36, International Association of Fire Fighters. In addition, Marvin K. Hammon; Pamela D. Meachum; Ralph J. Rust; Albert E. Montgomery; and The Progressive Firefighters Association were parties.

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UNITED STATES CODE CITED

Title 28, Section 1254(1) 2

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Marion S. Barry, Jr., the Mayor of the District of Columbia; the District of Columbia; and several of its officials petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The February 27, 1987, decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 813 F.2d 412. (App. 1a-78a). Its decision disposing of the petition for rehearing on August 14, 1987, is reported at 826 F.2d 73. (App. 79a-123a). The court of appeals has granted rehearing *en banc* and has scheduled oral argument for May, 1988, but has not vacated the panel judgment (App. 167a-168a). The order granting rehearing *en banc* is not reported.

The opinion of the United States District Court for the District of Columbia, issued on April 1, 1985, is reported at 606 F. Supp. 1082 (App. 124a-156a). Its order of April 26, 1985, is not reported (App. 159a-163a).

JURISDICTION

The initial judgment of the court of appeals was entered on February 27, 1987. (App. 164a-165a). On April 3, 1987, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*.

On August 14, 1987, the court of appeals denied the petition for rehearing. (App. 166a). On October 26 1987, the Chief Justice of the United States granted petitioners' motion to extend the time for filing this petition to and including January 11, 1988. (App. 169a). Subsequently, on November 20, 1987, the court of appeals granted petitioners' suggestion for rehearing *en banc* by that court. (App. 167a-168a).

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provision.

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..

U.S. Const. Amend. V.

B. Statutory Provisions.

Section 703 (a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 86 Stat. 109, 42 U.S.C. § 2000e-2(a) (1982 & Supp. III 1985), provides in pertinent part:

> It shall be an unlawful employment practice for an employer ——
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

D.C. Law 1-63, 22 DCR 6538, D.C. Code § 1-507, *et seq.*, provides:

§ 1-507. The goal of affirmative action in employment throughout the District government is, and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females, and males. As used in §§ 1-507 to 1-514, "available work force" means the total population of the District of Columbia between the ages of 18 and 65.

§ 1-508. Every District government agency shall develop and submit to the Mayor and Council an affirmative action plan. Such plan shall be submitted within 12 calendar weeks after May 6, 1976, and each year thereafter, at the time each agency's annual budget is submitted to the Council.

§ 1-509. (a) Each plan shall state the number of females and males who are Black, White, Spanish-speaking, Native American and Asian American, who would, by using the goal of their representation in the available work force in the District, be employed by the

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agency at the actual employment levels in the agency at the time the plan is submitted. Such numbers shall be broken down:

(1) Agency wide;

(2) Within each office in the agency; and

(3) Within each pay level of each salary in the agency.

(b) These shall be the goals, not the quotas, of the plan. The plan shall also state the actual employment levels in the agency, broken down in the same way as the goals, and the difference between the actual employment and the goals.

§ 1-510. The plan shall state the number of hires and promotions the agency projects for the period until the next plan is submitted, and the number of hires and promotions of the groups enumerated in § 1-509, projected for that period. Such projections shall be broken down in the manner provided in § 1-509.

§ 1-511. The plan shall further state what actions the agency is taking to secure the equal employment opportunity within the agency of the groups enumerated in § 1-509, and of the aging, the young, the handicapped, and the homosexual citizens of the District, whether such citizens be actual or potential employees of the District government.

§ 1-512. Equal employment opportunity is a continuing responsibility of every agency, whether or not the hiring and promotion goals in affirmative action employment plans have been reached.

STATEMENT

1. This case involves the legality of hiring entry level firefighters, by taking race into account to offset the disadvantage blacks would otherwise suffer because they did not score as well as whites on an unvalidated paper and pencil

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test, the Firefighters Selection Test (FST). Hiring was done in accordance with an Affirmative Action Plan (Plan) of the District of Columbia Fire Department. The Plan provided that, since 60 percent of those passing the FST were black, 60 percent of those appointed to the Department should be black. In the meantime, the District was investigating whether the FST could be shown to be job-related.

The Plan stated that its hiring provisions were adopted to avoid reversing the progress the Department had recently made in hiring blacks. Blacks comprise 64 percent of the labor force of the District of Columbia, and approximately 70 percent of the District government's workforce, but only 38 percent of the District's uniformed firefighters. The Plan found that this imbalance was due in large part to the District's use, from at least 1969 to 1980, of an earlier test, "Test 21," to hire firefighters. Test 21 was " 'designed to test verbal ability, vocabulary, reading and comprehension'." *Washington v. Davis*, 426 U.S. 229, 235 (1976). Four times as many blacks as whites failed this test. *Id.* at 237. There was an administrative finding in this case, resting on expert testimony, that the work of an entry-level firefighter is essentially physical and is not accurately assessed by cognitive measures. Thus, the Plan is founded on a judgment that the relative scarcity of black firefighters was largely due to the use of a test which severely disadvantaged blacks and probably was not job-related.

The district court held that the hiring provisions of the Plan were lawful under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, and the equal protection component of the Due Process Clause of the Fifth Amendment. In two separate decisions, a divided panel of the United States Court of Appeals for the District of Columbia Circuit has reversed, holding that the plan is unlawful. That court has granted rehearing *en banc*, but, in the meantime, is treating the existing opinions and judgment as ef-

fective. Accordingly, we are filing this petition to preserve the jurisdiction of this Court.[1]

2. This case grows out of charges filed with the District of Columbia Office of Human Rights (OHR) by two black firefighters, on their own behalf and on behalf of an organization of black firefighters, the Progressive Firefighters Association, challenging a variety of the Fire Department's practices as racially discriminatory. The charges encompassed hiring from the list of those who had taken Test 21 in 1977. The proceedings exposed the District to potential back pay liability. The District defended itself vigorously against the charges.[2]

After permitting the firefighters union, Local 36, International Association of Firefighters (Local 36), to intervene, an OHR hearing examiner held 50 days of public hearings and issued extensive findings. The examiner found that, for at least 10 years prior to 1980, entry level testing for the Fire Department was done by the Federal Office of Personnel Management (and its predecessor agency), which used Test 21, an examination which he found disadvantaged blacks. He also found that the FST, which the District began using in 1980, had a severe adverse impact on blacks[3] and had not been shown to be job related at all, much less that it could be used for rank order selection.

The hearing officer recommended that the Fire Department validate its entry level examination and develop an affirmative action plan. On administrative appeal, the OHR accepted these recommendations with minor modifications. No judicial review was sought.

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[1] See Motion to Defer Consideration of Petition for Writ of Certiorari and for Leave to File a Supplemental Petition, filed simultaneously with this petition.

[2] The District did concede, however, in light of its own experts' opinions, that the examination which the District had just begun using in 1980, the FST, had not been shown to be valid for rank order selection.

[3] For example, he found that, in 1980, while over one-half the whites taking the test placed among the top 200 scores, only a little more than 10 percent of the blacks tested scored within the top 200.

3. On March 22, 1984, four black firefighter applicants and the Progressive Firefighters Association brought suit in district court against, among others, the Mayor and the Fire Chief, seeking to compel compliance with the final OHR order. They also sought unsuccessfully to enjoin the Fire Department from administering the FST in March, 1984. Two months later, on May 23, 1984, the court entered a consent decree. The parties agreed that the District would give the FST to all persons who had previously appeared for the examination but were unable to take it. The decree further provided that the District would validate the entry level examination. but could continue hiring while the validation study proceeded. The District agreed to report to the court every six months on the progress of its validation study. The decree provided that the Fire Department would submit an affirmative action plan to the court.

Pursuant to the decree, the District filed with the court, on November 23, 1984, a detailed report on the status of its validation efforts. On February 7, 1985, the District filed its affirmative action plan, the hiring provisions of which are at issue here.

4. The Plan states that it is addressing underrepresentation caused by past racial discrimination effected substantially by Test 21, which was used to select entry level firefighters between 1969 and 1980. According to the Plan, Test 21 "tended to have an adverse impact on minorities both in the setting of the passing score and in the ordering of the candidates . . .. "[4]

The Plan ensures that black applicants are not disproportionately screened out of the hiring process without a job-related reason, and it is crafted so that it does not disadvantage whites. Nearly 65% of those who took the 1984 FST

[4]The fact that minorities scored less well "resulted in [their] being hired later . . .." Further, "[a] . . . consequence of delayed selection was that blacks tended to make other career choices while awaiting appointment" and "Blacks were more likely to exceed the maximum entrance age requirement for Firefighters . . . ."

were blacks, and 30% were whites. As indicated, the FST had been found not to have been validated. The Plan set the passing score on the examination at a level at which 60% of those who passed the test were black and 35% were white. This meant that almost 99% of the white applicants, but only 79% of the black applicants, would pass.

The Plan examined what would happen if successful applicants were selected in rank order. It found that, while nearly 65% of the test-*takers*, and 60% of the test-*passers* were black, rank order selection would result in the selection of perhaps *twice as many whites* as blacks. This result "would have the effect of reversing the progress that has been made during the past three years in increasing the population of minority Firefighters within the Fire Department." It was "[to] avoid these negative consequences of score-ordered referral" that the Plan adopted a procedure "to ensure that 60% of entry-level Firefighters are minorities . . .."

5. The day after the District submitted the Plan to the court, Local 36 and eight white firefighters sued to enjoin the Plan's promotion provisions. Three days later, on March 11, 1985, the United States filed its action. The court consolidated the three cases.

Thereafter, the parties stipulated that the hiring provisions of the Plan, which ensure that blacks will be hired in the same proportion as they passed the examination, were "designed solely to eliminate the . . . disparity which would exist if the examination results were used in rank order." Stipulation No. 30. They further stipulated that no party could show that persons scoring higher on the FST were likely to perform better on the job.

The parties cross-moved for summary judgment. After a hearing on those motions, the district court entered an opinion and order on April 1, 1985, ruling that the hiring provisions of the Plan were lawful under both Title VII and the Constitution, but that the promotion provisions were

unlawful. The court disapproved the entire Plan pending its reformulation in light of the court's opinion. App. at 156a.

In its opinion, the district court found that blacks, who represented only 38% of the Fire Department and less than 20% of the battalion chiefs and captains, but over 64% of the D.C. labor force, were significantly underrepresented. App. at 142a. The court specifically rejected the contention that the percentage of blacks in the Washington Standard Metropolitan Statistical Area (approximately 29%) was the proper basis for comparison. *Id.* It held that the 60 percent rate was reasonable in light of the high percentage of blacks applying for firefighter positions in recent years, over 74% black in 1980 and nearly 65% in 1984. *Id.* The court held that the hiring provisions of the Plan were justified to correct the racial disparity in the Department and to eliminate the disparate impact that would otherwise result from the use of the FST. It found that, if the FST were used for rank order hiring, while 60% of the test-passers were black, 82% of the first one hundred, and 69% of the second one hundred, persons selected would be white. App. at 135a. It also found that the FST had not been validated, and that there was no evidence showing that those who scored better on it would perform better on the job. *Id.*

The court further found that the hiring provisions of the Plan, which ensure that whites are hired in proportion to their pass rate, does not adversely affect the interests of white applicants. App. at 143a. The court held that, in the absence of "any clear options," the race-conscious provisions could not be held unlawful for failure to search for less objectionable alternatives.

6. The District appealed the district court's order precluding implementation of any portion of the Plan. It also asked the district court to stay its order insofar as the order precluded implementing the Plan's hiring provisions. By order dated April 26, 1985, the court granted the motion to stay those portions of the April 1 order precluding implemen-

tation of the hiring provisions of the Plan. The United States appealed from the court's rulings insofar as they permitted the Ditrict to hire pursuant to the Plan. The District's appeal was subsequently dismissed, but the court of appeals refused to dismiss the appeal by the United States.

In its initial decision in this case, a divided panel of the court of appeals reversed, holding that the hiring provisions of the Plan violated both Title VII and the Constitution. A majority of the panel ruled that the District had failed to establish discrimination by the Fire Department, the "absolutely indispensable" predicate for adopting a race-conscious affirmative action plan. App. at 27a. The majority further ruled that the District had impermissibly failed to consider obvious race-neutral alternatives and that, because the Plan was intended to achieve compliance with the District's affirmative action statute, D.C. Law 1-63, it constituted a constitutionally proscribed effort to attain a strict racial balance in its work-force. App. at 40a.

7. The District, which had made the affirmative action plan at issue effective only until April 15, 1987, and which had no alternative lawful means for hiring firefighters, took the position that it could continue hiring firefighters under the Plan until the Plan expired, or until the mandate of the court of appeals issued, whichever occurred first. On April 13, 1987, the court ordered that the mandate issue forthwith.

After hearing additional argument, on August 14, 1987, the panel denied rehearing in a divided decision with three different opinions. The majority reiterated its position that the hiring provisions of the Plan were unlawful. In a departure from its initial opinion, however, the opinion for the court rested this conclusion entirely on Title VII. App. at 86a. It did so in order to avoid ruling on whether the Attorney General has the power to challenge the Plan as un-

constitutional despite the absence of any specific grant of authority for him to sue directly under the Constitution. The concurring opinion, however, stated that the Attorney General had such authority and that the Plan violated both Title VII and the Constitution. App. at 94a, 104a. Both opinions reiterate that the District had not shown the predicate of discrimination necessary to justify race-conscious action. App. at 90a, 104a. On October 26, 1987, the Chief Justice granted an extension of time until January 11, 1988, in which to file a petition for a writ of certiorari. On November 20, 1987, the court of appeals granted rehearing *en banc*. App. at 167a. However, that court has not vacated the judgment of the panel, nor has it recalled its mandate.

REASONS FOR GRANTING THE WRIT

This is an exceptionally important case. As it now stands, the court below has crippled voluntary efforts by government employers to eliminate discriminatory barriers to employment and to cure the lingering effects of past unlawful discrimination. Its decision prevents voluntary action unless the government employer first confesses and proves its own unlawful acts. Its holdings are at war with *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 55 U.S.L.W. 4379 (1987), and relegate government employers to the uncertainties surrounding voluntary action to comply with Title VII that the Court attempted to dispel in *Johnson*.[5]

1. The decision below places severe restraints on the ability of a government employer to engage in voluntary race-conscious affirmative action under Title VII of the Civil

[5] In reaching its conclusions, the panel majority became a fact-finder, inventing facts that do not appear in the record and reversing trial court findings that are amply supported. This reversal of roles by an appellate tribunal also warrants further review.

Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[6] It prevents a government employer from engaging in race-conscious action to ameliorate the present effects of its own apparent past discrimination against blacks — even where the means it has chosen do not infringe on the legitimate expectations of whites at all—unless the jobs affected are highly segregated ("a garden of noxiously inexorable zeros") (App. at 91a, n.9)), or the employer admits and proves its own past discrimination. App. at 32a. Even in these circumstances, an employer may not engage in race-conscious action without first considering race-neutral alternatives. App. at 97a. The decision construes Title VII to permit voluntary affirmative action only by those least likely to engage in it (the most blatant discriminators) and those foolhardy enough to admit lawbreaking and invite monetary liability.

The court of appeals' decision may well persuade many local governments that voluntary efforts to redress apparent past discrimination are unwarranted, if not unwise.

2. The restrictions on voluntary affirmative action under Title VII which the court below announced are at war with the standards set forth in *Johnson.*

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[6] We view the decision of the court, as modified by the opinions denying rehearing, as resting entirely on Title VII. Judge Starr's opinion, designated the "Opinion for the Court" (App. at 80a), specifically so states: "there should be no doubt whatever that our decision in this case is grounded solely on the law of Title VII." App. at 86a. *See also* Judge Mikva's dissenting opinion. App. at 133a. Judge Silberman's opinion, designated "Concurring Statement," does state that it relies "on both Title VII and the Constitution." App. at 98a. However, Judge Silberman apparently believes that the standards for permissible affirmative action are identical under both Title VII and the Constitution except that Title VII provides an employer with greater latitude "to combat job segregation." App. at 109a. Furthermore, the judgment entered on the petition for rehearing expressly states that the petition is denied "for the reason set forth in *the opinion of the Court* . . . ." App. at 166a (emphasis added).

a. *Johnson* repeatedly emphasizes that it is not necessary for a government employer to admit or prove that it has engaged in past discrimination in order lawfully to engage in race-conscious affirmative action under Title VII. *See Johnson*, 107 S. Ct. at 1457 n.17 ("our unwillingness to require an admission of discrimination as the price of adopting a[n affirmative action] plan"); *id.* at 1451 n.8 ("the prospect of liability created by such an admission would create a significant disincentive for voluntary action"); *id.* at 1453 (employer need not "compile evidence that could be used to subject it to a colorable Title VII suit").

Under *Johnson*, statistics showing a virtual absence of blacks in the relevant positions are not a prerequisite for engaging in lawful race-conscious action under Title VII. The Court held that affirmative action may be adopted on the basis of statistics that are not sufficient to establish a prima facie case of discrimination, and that even weaker statistical disparities may suffice when supported by direct evidence of discrimination. *Id.* at 1453 n.11, citing *Teamsters v. United States*, 431 U.S. 324 (1977). Indeed, the Court took pains to emphasize that "an employer seeking to justify the adoption of a[n affirmative action] plan need not point . . . even to evidence of an 'arguable violation' on its part." *Id.* at 1451, citing *Steelworkers v. Weber*, 443 U.S. 193, 212 (1979) (Blackmun, J., concurring).

b. The court below held that, even where there is an adequate predicate for undertaking race-conscious action under Title VII, an employer may not lawfully do so without first considering race-neutral alternatives. Both *Johnson* and *Weber*, however, approved affirmative action where there was no showing that race-neutral alternatives had been considered. The only requirement they impose is that the race-conscious action undertaken on behalf of blacks not unnecessarily nor unduly, infringe on the rights or impair the expectations of whites. *Johnson*, *supra*, 107 S.Ct. at 1452, 1455.

Nor is there any reason for the court of appeals' search-for-alternative requirement. The court fashioned it by an inapt

analogy to the principle that a court cannot properly order a remedy that goes beyond the wrong it has found. App. at 28a. See also App. at 96a. However, this limitation on the remedial authority of courts is justified by the premise that a court may only infringe on rights — a party's liberty — to the minimum extent necessary to perform its function of providing redress. That concern is satisfied in the context of *voluntary* affirmative action by *Johnson's* requirement that the voluntary action not unduly interfere with the right and expectations of third parties.

The Fire Department's hiring plan here does not interfere with the legitimate expectations of whites at all, but only ensures that blacks have an equal chance to be hired. The hiring provisions here simply require that blacks will be hired in proportion to their success on the unvalidated test. It is only because 60% of those who passed the test are black that 60% of new hires will be black. This does not interfere with the legitimate expectations of whites because, while it means that blacks with lower test scores are selected before whites with higher scores, it was stipulated, and the district court found (App. at 135a.), the higher test scores have not been shown to reflect better qualifications. The Uniform Guidelines on Employee Selection Procedures, to which the United States has officially subscribed, specifically permit employers to disregard test scores on unvalidated tests to the extent necessary to eliminate adverse impact. *See* 28 C.F.R. § 50.14(6)(B) (where the test-user has been unable to validate an examination, "the user should eliminate adverse impact or otherwise justify continued use . . ..").

3. The Plan's hiring provisions fully meet *Johnson's* standards.

a. Under *Johnson*, an employer may lawfully undertake race-conscious action if there is a factual predicate sufficient to provide assurance that the action is remedial. *Johnson*, *supra*, 107 S. Ct. at 1452 ("prompted by [remedial] concerns"). That predicate need not rise to the level of

establishing a prima facie case of discrimination and may be established wholly by statistical, or entirely by non-statistical, evidence. *Id.* at 1453 n.11. Direct evidence of discrimination may buttress relatively weak statistical evidence. *Id.*

Title VII permits race-conscious affirmative action in circumstances where the Constitution would not. Id. at 1450 n.6 ("the *statutory* prohibition . . . was not intended to extend as far as that of the Constitution") (emphasis in original). *See also id. at* 1452 (text at n.9). The Constitution requires no greater a factual predicate than that an employer have a "strong basis in evidence" for concluding that there had been prior discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267, _____, 106 S. Ct. 1842, 1848 (1986) (plurality opinion). *See also id.* at 1853 (O'Connor, J., concurring) ("firm basis for believing"), and *id.* at 1863 (Marshall, J., dissenting).

b. The District here had an exceptionally strong basis for believing that it had discriminated against blacks in the past.

(i) The hiring provisions of the Plan at issue here found that blacks were substantially underrepresented in the Fire Department. This finding was made by comparing the percentage of blacks in the Department (38%) with the percentage of blacks of labor force age in the District (64%). This comparison was mandated by D.C. Law 1-63, codified at D.C. Code § 1-507 *et seq.* (1981). The law uses the working-age population of the District because, when the law was enacted in 1976, black representation in the D.C. government's work-force as a whole was "far closer to proportional with the District's available labor force than with any other geographical unit that might be appropriate." Councilmember John A. Wilson's Jan. 9, 1976 Memorandum to the Council re Bill No. 1-133 (Wilson Memorandum) at 8. At that time, blacks comprised over 67% of the D.C. government's

total labor force. *Id.* at 1. There is no apparent non-discriminatory reason why blacks should not be represented in the Department in numbers comparable to the rest of the government, especially because the firefighting position does not require skills that are not readily acquired. *See Hazelwood School District v. United States.* 433 U.S. 299. 307-308 & n.13 (1977). The high percentage of black applicants for positions with the Department in recent years (74% in 1980, and nearly 65% in 1984) further buttresses the inference that the relative scarcity of blacks in the department is due to discrimination.

(ii) The Plan found that this underrepresentation was largely due to Test 21 which disproportionately disadvantaged blacks both by its cutoff score and by rank ordering. At the cutoff, Test 21 rejected four times as many blacks as whites. *Washington v. Davis, supra,* 426 U.S. at 237. The hearing examiner in the administrative litigation here found that whites score relatively well on the examination, while blacks who pass tend to cluster near the cutoff. As the Plan explained, since lower scorers were selected later, this meant that blacks were more likely than whites never to be hired. *See* n. 4, *supra.* The District had strong reason to believe that this test was not valid. Test 21 is a cognitive test, "designed to test verbal ability, vocabulary, reading and comprehension." *Washington v. Davis, supra,* 426 U.S. at 235. There had been an administrative finding, resting on expert testimony, that "the work of a firefighter . . . is essentially physical and . . . correlations with cognitive measures are unconvincing as demonstrations of job-relatedness." Hearing Examiner Finding No. 47.

A test which disproportionately disadvantages blacks and has not been shown to be job-related is racially discriminatory and unlawful under Title VII. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). Indeed. a showing that a test has an adverse impact on blacks constitutes a *prima facie* case of unlawful discrimination. *Griggs, supra,* 401 U.S. at 432; *Albemarle,*

supra, 422 U.S. at 425. Thus, the District had strong grounds to believe that it had discriminated against blacks the entire time it used Test 21, *i.e.*, from at least 1969 to 1980. For virtually identical reasons, the District had strong reason to believe that its 1980 rank order hiring from the FST was also discriminatory.

4. The court of appeals wrongly held that *Johnson* did not govern this case.

a. The court gave a variety of reasons why there was no adequate predicate here for lawful race-conscious action under Title VII. None has merit.

(i) The court held that there was no imbalance of blacks in the Fire Department because the percentage of blacks in the Department (38%) had to be compared with the percentage of blacks in the Washington Standard Metropolitan Statistical Area (SMSA) (29%). App. at 88a. While the majority observed that half of the applicants came from outside the District, nearly three-fourths were black. Thus, use of the percentage of blacks in the SMSA (29%) would vastly understate the percentage of blacks applying, and therefore could not give an accurate picture of the number of blacks who would have been hired absent discrimination. Accordingly, the court erred in holding that comparison with the SMSA was required and in setting aside the district court's contrary factfinding. *See Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

(ii) The court also held that it was improper to rely on the 1980 and 1984 applicant flow statistics without showing that they were representative of earlier years. App. at 89a-90a n.7. That ruling squarely conflicts with the holding of the Fourth Circuit in *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981), which rejected the contention that Washington SMSA is the appropriate benchmark for assessing discrimination in Fairfax County; accepted applicant flow as the proper benchmark; and specifically held both that

applicant flow for earlier years can be inferred from a subsequent year, and that the burden is on the opposing party to show that earlier years were different. It also conflicts with *Johnson's* holding that the party challenging an affirmative action plan has the burden of proving its invalidity. 107 S. Ct. at 1449. *Fairfax* is manifestly more sensible; *Johnson* controls.

(iii) The majority implies that there was no past discrimination by means of Test 21.

(A) It asserts that applicants were not hired in rank order on the basis of their scores on Test 21. App. at 8a. There is no basis in the evidence for this suggestion; it represents wholly unsupported appellate fact-finding.

The finding also rests entirely on a misconception. The majority inferred that, because the list of test-passers ("register") was "exhausted," that "rank ordering was not in fact employed. . . ." *Id.* However, exhausting the register only reflects that everyone on it was ultimately reached; it says nothing about the order in which applicants are reached. The Plan reflects that, during the time Test 21 was used, there was rank order selection; that is why blacks, who scored relatively less well, were reached later.

In any event, even if there had been no rank order hiring, that would not have cured the discrimination against blacks who did not reach the cutoff score and were not listed on the register.

(B) The majority implies that Test 21 was in fact valid for firefighter jobs because the District defended its action in the administrative litigation. App. at 5a. In fact, the District's position was that the complainants, who had called no testing expert, had failed in their burden of proof. But even if the District, which was exposed to potential back pay liability in the administrative proceedings had argued for the validity of Test 21, the District would not be barred from subsequently acknowledging that there had been no proper validation. *Cf. Wygant, supra*, 106 S. Ct. at 1849.

The majority also suggested that Test 21 must be valid for firefighter jobs since this Court affirmed a finding that it was valid for police jobs in *Washington v. Davis, supra.* App. at 5a; App. at 104a (Silberman, J., concurring). This ignores the administrative finding that cognitive tests, like Test 21, are ill-suited to assess job relatedness for entry firefighter jobs, because they are largely physical and often performed under great stress. That finding was based on considerable expert testimony.

(iv) The majority relied heavily on the fact that over 75 percent of the Department's hirings since 1981 have been blacks. App. at 86a. As the dissent points out, such reliance is "ridiculous." App. at 120a. The District abandoned rank order hiring when it became clear the FST was not properly validated. When it did so, "obviously the percentage of blacks hired would [roughly] mirror the percentage of black applicants." *Id.*[7]

b. The Circuit also improperly ruled that the District did not consider available alternatives.

(i) The District had no valid substitute when, in November 1983, there was a final administrative decision finding that the FST had not been properly validated.

(A) As the United States recognized in *United States v. Paradise*, 107 S. Ct. 1053, 1068 n.21 (1987), it ordinarily takes years to validate a test. It would have been unlawful to select from the FST in rank order, in light of its severe adverse impact,[8] and a finding that it had not been validated. *Griggs v. Duke Power Co., supra.*

[7]The majority also uses the post-1980 figures to inflate the Department's earlier hiring statistics. Thus, it asserts that the Department has been hiring "almost 50 percent [blacks] per year since 1969." App. at 86a. The 50% includes a significant amount of hiring after 1980, when the District abandoned rank order hiring. Approximately 42% of those hired between 1969 and 1980 were black. App. at 32a. Applicant flow information, however, strongly suggests that perhaps as much as 60% of those applying were blacks. One must conclude that a much greater percentage of black than white applicants were rejected during this entire period.

[8]See n.3, *supra.*

(B) Random selection has been prohibited by Congress since 1981, when Congress enacted, as part of the District appropriations, a prohibition on the use of random selection for hiring firefighters. *See, e.g.*, Pub. L. No. 97-91, 95 Stat. 1182 (December 4, 1981); Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984 (enacting H.R. 5899).[9]

(C) The use of physical ability tests would have subjected the District to sex discrimination lawsuits. The only judicial holding regarding such tests at that time had found such a test unlawfully to discriminate against women. *See Berkman v. City of New York*, 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983).

(D) The District attempted to validate the FST by a new strategy, while in the meantime eliminating the adverse impact on blacks, by hiring blacks in nearly the same proportions as they passed the test. This was specifically authorized by the Justice Department's Uniform Guidelines.[10]

(ii) While the district court found that there were no "clear options" available to the District, the court of appeals set aside that finding. It did so principally on the basis of an assertion made at oral argument by counsel for the black plaintiffs' in *Hammon* that there were satisfactory, non-discriminatory tests employed in other jurisdictions. App. at 38a-39a. That assertion was wholly unsubstantiated, and plaintiffs' earlier filings in the record strongly suggest that a careful employer could not safely rely on it.[11]

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[9]Since Congress appropriates the District's entire budget, D.C. Code § 47-304 (1987 repl. volume), the District was not free to spend any funds in hiring firefighters by random selection.

[10]*See* 28 C.F.R. § 50.14(6)(B). *See also Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019, 3037 (1986) ("court may . . . order interim hiring . . . goals pending the development of nondiscriminatory hiring . . . procedures"); *Paradise, supra*, 107 S. Ct. at 1069 (same).

[11]The tests to which the *Hammon* plaintiffs apparently referred were filed in the district court record as appendices to Record Document 21. They were submitted to the District just before Christmas in 1984, unaccompanied by validation materials. There is no evidence that those tests have ever been validated. As the United States pointed out in *Paradise, supra*, 107 S. Ct. at 1068 n.21, validation often takes years.

The majority also relied on alternatives that "suggest themselves at a moment s reflection." App. at 39a. These were in essence that 1) the District continue to use the FST (which, as noted, would be illegal under *Griggs*); 2) the District try to validate the test (which it had done, without success); and 3) that it abandon the FST (which, with no lawful alternative, would not permit the District to hire firefighters). These amount to no real alternative at all and simply reinforce the correctness of the trial court's finding that there were no clear alternatives.

5. The Plan is not an attempt to impose "racial balance" or to take jobs from whites and give them to blacks.

a. Contrary to the opinion of the court on rehearing (App. at 93a-94a, n.11), the 60% rate at which the Plan provides that blacks should be hired was not determined by reference to the District's ultimate goals under D.C. Law 1-63; it was directly determined by the percentage of blacks who passed the FST in 1984. All parties stipulated below that the selection rate was determined solely by the passing rate of blacks on the 1984 FST.[12] The majority's disregard of this stipulation is utterly unwarranted.[13]

b. The legislative history of D.C. Law 1-63 reflects that its ultimate goals are intended to be "aspirations" in precisely the same way as the ultimate goals of the plan in *Johnson*. 107 S. Ct. at 1454. Like those of the plan in *Johnson*, the long-range goals of D.C. Law 1-63 are sharply distinguished from the short-term "projections" that are to

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[12] Stipulation No. 30 reads:

> The AAP requires the use of multiple certificates to select firefighters and is *designed solely to eliminate the racial* and sexual *disparity which would exist if the examination results were used in rank order.* (emphasis supplied).

[13] The fact that the 60% hiring rate approaches the 64% ultimate goal proves nothing. If the District wanted its selection rate to mirror the 1980 census figure, it could have based that rate on the percentage of black *applicants* in 1984 which, coincidentally, was 64.6%, rather than on the lower 60% figure for *test-passers*.

govern actual employment decisions, and "the projections are what is actually to be achieved. . . ." Wilson Memorandum, *supra* at 7. Like the short-term goals in *Johnson*, the projections under D.C. Law 1-63 are to take into account the "skills-related workforce." *Id.*

c. The FST was not cynically used so that its adverse effects could be corrected, *see* App. at 40a, but in the hope that, once people were hired representing a range of test scores, those scores could be compared with performance. See November 23 Report to the district court, Exhibit 4. In other words, the test was given in part to obtain more information regarding its validity.

d. This Plan was not an attempt to garner jobs for blacks at the expense of whites. See App. at 111a (concurring opinion).

(i) The hiring rate was not set at the percentage of blacks in the applicant pool (nearly 65%), but rather at the percentage of black test-passers (60%). The result was that 99% of the whites, but only 79% of the blacks, passed the test. The rate was set at the minimum level that could be used without unlawfully discriminating against blacks. Presumably, if the District were trying to maximize black hirings, it would have set some higher rate, such as the percentage of blacks in the working age population in the District in 1984 (70%; see App. at 114a (dissenting opinion)) or a figure considerably above applicant flow to provide "catchup relief." *Cf. Paradise*, *supra*, 107 S. Ct. at 1072 & n.30 (Promotion rate set at 50%, considerably above the percentages of blacks available for promotion, to "accelerate[ ]" progress in reaching ultimate goal). The fact that the District did not shows that the Plan is not designed to provide as many jobs for blacks as possible.

(ii) The Plan does not create a preference for blacks. In fact, it creates a slight (but apparently legally insignifi-

cant)[14] preference for whites. White applicants, who comprise only 30% of the applicants, will be selected for 35% of the positions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] The Plan explains that adverse impact against blacks was only reduced to 80% of the rate for whites because "that would enable us to remain in conformance with the 80% rule of the Uniform Guidelines on Employee Selection Procedures . . .." 29 C.F.R. § 1601.4D provides that a selection rate for any group that is greater than 80% of the rate for any other race group "will generally not be regarded . . . as evidence of adverse impact."